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No. 06-531

IN THE

Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Petitioners,

v.

T. A. WYNER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

CARRI S. LEININGER
JAMES O. WILLIAMS, JR.
WILLIAMS, LEININGER & CROSBY
1555 Palm Beach Lakes Blvd.
Suite 301
West Palm Beach, FL 33401
(561) 615-5666

VIRGINIA A. SEITZ*
DAVID S. PETRON
PANKAJ VENUGOPAL
ROBERT A. PARKER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

*Counsel of Record

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INTRODUCTION AND SUMMARY OF ARGUMENT

At bottom, plaintiffs contend that they are entitled to attorney's fees because they got what they wanted, even though the court never determined that the State officials violated federal law or ordered the State to provide relief at the end of the case. The central justification for attorney's fees under § 1988, however, is that "the civil rights defendant, who is required to pay the attorney's fees, has *violated* federal law." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 137 (2005) (emphasis supplied). "Section 1988 simply does not create fee liability where merits liability is non-existent." *Kentucky* v. *Graham*, 473 U.S. 159, 168 (1985). The State treasury should not be required to pay fees when the State has not been held to be a violator of federal law or otherwise ordered to provide relief resolving a plaintiff's legal claim.

Plaintiffs rely on a preliminary injunction temporarily enjoining State officials from enforcing the nudity ban against them. A preliminary injunction, however, is the result of a balancing process that determines how the parties interact *while the court decides a plaintiff's claim.* It neither determines that a defendant has violated federal law nor constitutes a merits determination, and is not a material change in the parties' legal relationship under this Court's jurisprudence. It is irrelevant that plaintiffs were temporarily able to engage in desired conduct; indeed, a party who obtains a *permanent* injunction that is later reversed temporarily engages in desired conduct, but is not a prevailing party. See, *e.g.*, *Pottgen* v. *Mo. State High Sch. Activities Ass'n*, 103 F.3d 720, 723-24 (8th Cir. 1997); *Palmer* v. *City of Chi.*, 806 F.2d 1316, 1320 (7th Cir. 1986). It is also irrelevant that the preliminary injunction was not appealed and could be enforced by contempt. A preliminary injunction alone does not confer prevailing-party status.

In the alternative, plaintiffs did not prevail because, after the district court granted preliminary relief, it rejected its

tentative reasoning and entered final judgment for the State on the merits. Plaintiffs' sole response is a revisionist assertion that the preliminary injunction was based on a content-discrimination claim that was not mentioned in the motion, expressly assumed away in the preliminary injunction, and rejected by the court of appeals. In granting the preliminary injunction, the district court specified that it did so because the State had less restrictive alternatives to its nudity ban. That specification is binding. See Fed. R. Civ.-P. 65(d) (requiring injunction to "set forth the reasons for its issuance" and be "specific in terms"). The court's ultimate reversal of its tentative conclusions on a full record and entry of judgment for the State means that plaintiffs did not prevail.

Finally, plaintiffs claim prevailing-party status even when a preliminary injunction is based on a legal claim that becomes moot before adjudication. This assertion cannot be reconciled with the logic of this Court's decisions, see Pet. Br. 32-34. It is wrong and unfair to treat a plaintiff as a prevailing party based on a preliminary injunction when a claim is mooted before a defendant can fully defend its laws. Indeed, plaintiffs' contrary assertion is irreconcilable with *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 603-04 (2001), which holds that a plaintiff who commences litigation and "gets his way" is not a prevailing party, even when a defendant precipitates mootness. Judicial resolution of the claim is required. *Id.* at 615 (Scalia, J., concurring).

ARGUMENT

I. PLAINTIFFS WHO OBTAIN A PRELIMINARY INJUNCTION AND NOTHING MORE ARE NOT PREVAILING PARTIES.

This Court "ha[s] emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes." *Indep. Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 762

(1989). At the end of this case, the district court found no constitutional violation and entered final judgment for the State officials. Plaintiffs did not prevail.

Plaintiffs erroneously contend that a preliminary injunction is "'relief by the court'" that "'material[ly] alter[s]'" the parties' relationship, making them prevailing parties. Resp. Br. 19 (quoting *Buckhannon*, 532 U.S. at 603-04). But the mere fact of relief or some change in the parties' relationship is insufficient for prevailing-party status. To cause a material change, the judicial relief must result from "a *resolution* of the dispute" in the plaintiff's favor. *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (emphasis supplied). A preliminary injunction does not fit the bill because it is a temporary order addressed to the reality that it takes time for the judicial system to resolve a case.

A. Plaintiffs Are Not Prevailing Parties Simply Because A Preliminary Injunction Temporarily Permitted Them To Engage In Desired Conduct.

1. Plaintiffs' principal argument is that they are prevailing parties because the preliminary injunction allowed them to engage in the February 14, 2003 nude peace symbol without state interference. This argument cannot withstand scrutiny. A preliminary injunction temporarily precludes the State from enforcing its laws against a plaintiff, but does so only as a consequence of the time our legal system requires to adjudicate a claim. It neither resolves the underlying claim nor decides its merits; it plainly does not determine that the defendants violated federal law. It means only that in balancing the relevant equitable factors, including a prediction of success on the merits, the court has determined that *while it adjudicates the actual merits*, the status quo should favor the plaintiffs.

The fact that a plaintiff "gets his way" while the wheels of justice turn does not make him a prevailing party. *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring). That is

why, as plaintiffs concede (Resp. Br. 24), a party who obtains real-world relief through a temporary restraining order is not a prevailing party. And, that is why even a party who obtains a *permanent* injunction, and thus a period of relief, is not a prevailing party if that injunction is overturned, although in the interim the party engages in desired conduct. See *supra* at 1 (citing cases); *Buckhannon*, 532 U.S. at 603-04.

Plaintiffs try to squeeze the required effect on "substantial rights," *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 (1980) (per curiam), from the preliminary injunction by claiming that the State cannot arrest plaintiffs for their February 14, 2003 protest. Resp. Br. 21. If this is correct,[1] it is only a byproduct of the court's decision to structure the status quo pending its merits decision to benefit plaintiffs; it does not convert the preliminary decision into relief resolving a legal claim and finding the defendants violators of federal law. In any event, plaintiffs' argument proves too much. Plaintiffs whose preliminary injunctions are reversed on appeal are *not* prevailing parties, see *supra* at 1. Yet the state cannot criminally prosecute such plaintiffs for actions protected by the later-reversed preliminary injunction, Resp. Br. 21 & n.7.

This case illustrates why this Court should not adopt a legal rule authorizing prevailing-party status simply because a

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[1] Although plaintiffs assert that State officials "continue to be prevented from prosecuting respondents for engaging in the protest on February 14, 2003," Resp. Br. 20-21 & n.7 (citing, *inter alia*, *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920)), this is far from settled. This Court has not resolved the question of whether a preliminary injunction barring state officials from enforcing a state law provides complete immunity against liability if that law is later adjudged to be valid. *See Edgar* v. *MITE Corp.*, 457 U.S. 624, 630 (1982) (declining to address the issue, and saying that it was "not ... frivolous ... by any means"). *See id.* at 653 (Stevens, J., concurring in part) ("[t]here simply is no constitutional or statutory authority that permits a federal judge to grant dispensation from a valid state law").

party obtains benefits as the result of a preliminary injunction. The preliminary injunction issued here resulted from the district court's tentative view that plaintiffs were likely to prevail on their claim that Florida's nudity ban was unconstitutional as applied to their expressive conduct, an error rectified on summary judgment.

Finally, and most importantly, this Court's cases make clear that relief resulting from the "resolution" of a plaintiff's claim in his or her favor is a prerequisite for prevailing-party status. *Tex. State Teachers Ass'n.*, 489 U.S. at 792. A plaintiff obtains such relief only when the court determines that the defendant is liable on a claim and "only in that event has there been a determination of the 'substantial rights of the parties.'" *Hanrahan*, 446 U.S. at 758. A preliminary injunction is provisional, not final. Plaintiffs' attempt to equate a preliminary injunction with "an irreversible partial summary judgment on the merits" (Resp. Br. 21) is, accordingly, wrong. A preliminary injunction is *not* "tantamount to [a] decision[] on the underlying merits," *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 394 (1981); it simply "preserves" the status quo based on a prediction and other equitable factors. *Id.* Temporary relief based on a preliminary injunction cannot confer prevailing-party status.

2. Because plaintiffs believe that the preliminary injunction made them prevailing parties, they next argue that the State officials' failure to appeal the preliminary injunction should not deprive them of prevailing-party status. The premise is wrong; plaintiffs were never prevailing parties. And, the State officials' (successful) decision to litigate this case to judgment on the merits, instead of appealing the preliminary injunction, does not alter this conclusion.

As plaintiffs state, although a preliminary injunction is neither a final order nor a merits determination, it is immediately appealable under 28 U.S.C. § 1292(a)(1). But, on appellate review of a preliminary injunction, as in the district court, the question is not whether plaintiffs' legal

claims are meritorious. The question is whether the district court abused its discretion in balancing the equitable factors, including the plaintiffs' likelihood of success on the merits. See, *e.g.*, *Schiavo ex rel. Schindler* v. *Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005). Nor is the fact that an order is interlocutorily appealable relevant to whether it permanently resolves a plaintiff's claim. See U.S. Br. 26-27 (citing examples of interlocutory appeals on non-merits issues).

A preliminary injunction makes no definitive finding about compliance with federal law and resolves no claim; indeed, as occurred here, an enjoined defendant may ultimately be fully vindicated. See, *e.g.*, 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4445, at 301 (2d ed. 2002) ("[g]rant or denial of interlocutory injunctions clearly does not foreclose further litigation in the same proceeding, so long as [the] decision rested on mere preliminary estimates of the merits or discretionary remedial grounds").[2] Neither the decision not to appeal nor affirmance of a preliminary injunction on appeal give the injunction preclusive effect on the merits. See *United States* v. *United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198-99 (1950); *Camenisch*, 451 U.S. at 395. Whether appealed or not, preliminary injunctions do not confer prevailing-party status.[3]

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[2] Plaintiffs insinuate that preliminary injunctions sometimes have preclusive effect, but in reality, they are eligible for preclusion only "if they rest on grounds that overcome the ordinary limits of procedure and discretion." 18A Wright et al., *supra* § 4445 at 305; *id.* § 4445 at 306 ("[p]reclusion is proper so long as the parties have had a full opportunity to advance *all the evidence and arguments that would be available at a full-scale trial on the merits*") (emphasis supplied).

[3] Plaintiffs claim that the preliminary injunction was "likely" to "have been upheld on appeal." Resp. Br. 24. Such hypothesized outcomes are easy to assert and difficult to prove. This argument, moreover, proves our point. On appeal, the district court's decision would have been reviewed

Plaintiffs' suggestion that a plaintiff who obtains a preliminary injunction is a prevailing party unless the State successfully appeals that injunction would be true only if a preliminary injunction were an order resolving a plaintiff's legal claim, which it most emphatically is not.

Finally, plaintiffs' position belies any assertion that their proposed legal rule would conserve the parties' and the courts' resources. In plaintiffs' view, the State officials were required to engage in emergency appellate litigation – seeking a stay and expedited review of the preliminary injunction under the less rigorous merits inquiry and lower standard for appellate review for such relief – *solely to avoid liability for attorneys' fees*. To protect the treasury, state officials would have to appeal every preliminary injunction, though they might prefer to use those resources to litigate a claim's merits (as the State did here) or to fund other state priorities. That would make no sense. See U.S. Br. 26. ("Congress did not enact the attorney's fee statutes to proliferate the number of highly time-sensitive interlocutory appeals taken by governments for the sole purpose of protecting the public fisc from attorney's fee liability").

3. In a similar vein, plaintiffs argue that preliminary injunctions materially alter the parties' legal relationship because they are enforceable by contempt. Again, the problem with this argument is that the preliminary injunction orders the parties' legal relationship temporarily, and does not resolve a plaintiff's legal claim; it sets the rules for the holding action that occurs *while the court is deciding the merits*. The enforceability of such an order by contempt does not transform it into relief that resolves plaintiffs' legal claims. See, *e.g.*, *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 53

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under the abuse of discretion standard, but on a "complete evidentiary record[]," the court found that the ban was no more restrictive than necessary, was content-neutral, and furthered an important government interest. Pet. App. 45a, 35a-36a, 41a.

(1991) (contempt "depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation"). A defendant could be held in contempt for violation of an injunction; and if the injunction were reversed on appeal, the plaintiff would not be a prevailing party.

The purpose of the contempt power is to vindicate the authority of the court, not to transform a preliminary prediction into a determination that the defendant was a "violator of federal law," *Martin*, 546 U.S. at 137, as required for prevailing-party status. Like preliminary injunctions, such judicial orders do not "materially alter" the parties' legal relationship in the manner required to make the plaintiff a prevailing party.

B. Preliminary Injunctions Do Not Confer Prevailing-Party Status Because They Neither Determine That Defendants Violated Federal Law Nor Oblige Defendants To Provide Relief That Resolves A Plaintiff's Legal Claim.

1. In arguing that preliminary injunctions are sufficiently merits-based to confer prevailing-party status, plaintiffs first mischaracterize the State officials' argument that a preliminary injunction does not decide a claim's merit as a factual argument that there was insufficient time for the State to fully present its position on the merits at the preliminary-injunction stage or on appeal from the order. In fact, as is often true in cases involving preliminary injunctions, the motion was presented for the court's determination shortly before the event at issue (2 days), and was entered less than 24 hours before the event occurred, making it extremely difficult for the State to seek review.[4] But, although the

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[4] Plaintiffs seek to blame this on the State, noting that Wyner first notified State officials of her planned February 14, 2003 nude peace symbol in mid-January 2003. Resp. Br. 25. The State has strong counter-arguments as the chronology set forth at Pet. Br. 5-6 demonstrates, most notably the

circumstances of this case effectively illustrate why a party who obtains only a preliminary injunction should not be a prevailing party, it is the provisional *nature* of a preliminary injunction (not the circumstances here) that explains why such an order does not confer prevailing-party status.

The questions whether a preliminary injunction should issue and whether a plaintiff prevails on the merits "are significantly different." *Camenisch*, 451 U.S. at 393. In issuing a preliminary injunction, the court makes a prediction about the likelihood of the plaintiff's success on the merits as one element in a multi-factor balancing of interests to determine how to structure the parties' relationship *during the pendency of the merits determination.* For claims akin to the First Amendment claim here, courts place a heavy thumb on the scale favoring a preliminary relief for fear of depriving a party of constitutional rights "for even minimal periods of time." J.A. 95. To obtain attorneys' fees, however, a party must actually prevail, not simply be predicted to prevail, and the defendant must be found to bear legal responsibility for providing relief that resolves a legal claim. Cf. *Camenisch*, 451 U.S. at 394 (admonishing that likelihood of success should not be equated with actual success).

Indeed, in likening preliminary and permanent injunctions, plaintiffs turn a willfully blind eye to the nature of preliminary injunction proceedings generally, and to the nature of the proceedings here. There are both substantive and "significant procedural differences between preliminary and permanent injunctions." *Id.* at 394. "[T]he parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial

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fact that Wyner had asked State park officials to perform nude in 2001, and been informed by attorneys for the State that she could not do so, *id.* at 5. The issue, however, is not who is to blame for the fact that a hasty injunction hearing was required, but rather whether a preliminary injunction confers prevailing-party status.

decision based on the actual merits of the controversy." *Id.* at 396. Time pressures often "deprive[] the defendant of valid defenses," *Hewitt* v. *Hampton*, 482 U.S. 755, 762 (1987), and limit the scope of the parties' evidentiary and legal presentation. *Camenisch*, 451 U.S. at 395.

It is fundamentally unfair to treat a plaintiff as a prevailing party and award attorney's fees based on such proceedings. That is why a preliminary injunction is limited in effect to a non-binding prediction, enforced to prevent irreparable harm while the court adjudicates a claim's merit. That is also why the Federal Rules require a plaintiff seeking an injunction to give security to "'protect[] against a court order granted without the full deliberation a trial offers.'" See Fed. R. Civ. P. 65(c); *Camenisch*, 451 U.S. at 397.

2. Plaintiffs acknowledge that preliminary injunctions sometimes lack *res judicata* effect (that is the general rule), but claim that some *may* have such effect and thus be sufficiently merits-based to confer prevailing-party status. Resp. Br. 28. Plaintiffs do *not* claim that the preliminary injunction here has such effect, nor could they since the underlying claim was not fully or fairly litigated. But even a preliminary injunction with some preclusive effect (*e.g.*, in a subsequent petition for emergency relief) would not confer prevailing-party status unless it provided relief resolving a plaintiff's legal claim in his or her favor.

In rare situations, a reviewing court or the district court may later either convert a preliminary injunction into a permanent injunction or, because the facts are not in dispute, issue a dispositive legal ruling (rather than a prediction) on the actual merits of a claim. See, *e.g.*, *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755-757 (issuing controlling decision of law where the district court's injunction decision "rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance"), *overruled on other grds. by Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1986); see

generally Fed. R. Civ. P. 54(b). In that setting, a preliminary injunction may become a full-fledged judgment on the merits and support a claim to "prevailing party" status. In most cases, including this one, however, the preliminary relief does not resolve any substantive issue of law on the merits.[5]

3. Contrary to plaintiffs' contention, the proceedings here illustrate – both procedurally and substantively – why a preliminary injunction is not sufficiently merits-based to confer prevailing-party status. Plaintiffs claim that the State officials did not object to the timing of the hearing or their inability to develop additional evidence (ignoring the objections defendants did make, see Pet. Br. 7, the court's overruling of those objections based on the need for expedition, *id.*, and the court's discomfort with the speed of the proceedings, *id.* at 7-8). But plaintiffs were entitled to seek emergency relief, and the State could not object on the ground that they had to participate by telephone, that no discovery had occurred, that defendants' witnesses were not prepared or available, and that other due process protections that precede trial had not occurred. That is the nature of an emergency proceeding.

There are tradeoffs that result from litigating a claim in an emergency proceeding. Plaintiffs obtain the benefit of a more

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[5] In a related point, plaintiffs speculate that courts do not vacate preliminary injunctions when they become moot because sometimes they have *res judicata* effect. Resp. Br. 28 & n.11. In fact, this general practice results from the fact that "a prior ruling need not be vacated [when] there is no possibility that it will have any collateral consequences." 13A Wright et al., *supra*, § 3533.10, at 437. *See also Gjertsen* v. *Bd. of Elec. Comm'rs*, 751 F.2d 199, 202 (7th Cir. 1984) (generally "since only a final judgment has res judicata or collateral estoppel effect, there is no harm in letting an interlocutory order stand"). Any limited preclusive effect of a preliminary injunction would not confer prevailing-party status unless it resulted in the favorable resolution of a plaintiff's legal claim.

relaxed merits inquiry, of a veritable presumption of irreparable harm in the First Amendment context, and of expeditious interim relief. But in accepting those benefits, plaintiffs must accept the consequence that their temporary relief alone did not entitle them to fees. They still must prove their case; they must win on some claim to prevail.

The litigation of the substance of plaintiff's claim at the preliminary-injunction stage underlines this point.[6] Although plaintiffs fault the State officials' position that the "nudity ban was a reasonable restriction," Resp. Br. 39, the district court adopted the State's position as its final unappealed ruling. Pet. App. 42a-46a. See also *id.* at 7a-8a n.7 (plaintiffs "were unable to achieve actual success on the merits").

Plaintiffs try to rewrite history to make their preliminary injunction at least a potential victory on the merits by asserting that it was based on a claim that the State officials' decision was content-based. This conflicts with the district court's express statement that it assumed content neutrality, as well as the court of appeals' reliance on this assumption, see *id.* at 6a-7a n.4. In fact, plaintiffs' motion did not assert that the denial was content-based (other than because it contained nudity); and the district court simply misinterpreted

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[6] Plaintiffs contend that the State officials' letter authorizing plaintiffs to conduct their protest so long as they complied with the minimum-clothing requirement "was directly contrary to a pre-existing court approved settlement." Resp. Br. 39. In fact, that settlement agreed to only a single nude expressive event on *February 19, 1996*, and authorized performance of the nude expressive activity *with* restrictions (a screen and signs). *See* Pet. Br. 4-5. The demonstrators did not remain behind the screen in 1996, and Wyner did not intend to remain behind the screen on February 14, 2003, *id.* at 7. And, as plaintiffs are aware, the State rejected a request from plaintiff that she be permitted to perform nude in 2001. *Id.* at 5. The State officials' actions did not contravene any settlement agreement.

the telephonic testimony of a park official, see J.A. 76-77.[7] Any claim of content-based discrimination vanished with summary judgment, Pet. App. 41a, and appeal, *id.* at 6a-7a.

Plaintiffs' post hoc argument is also unavailing as a matter of law. Federal Rule of Civil Procedure 65(d) requires that "[e]very order granting an injunction . . . shall set for the reasons for its issuance" and "shall be specific in terms." The meaning of a preliminary injunction is governed by its terms. "[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders . . . ." *Schmidt* v. *Lessard*, 414 U.S. 473, 476 (1974) (per curiam). Thus, the district court's express assumption in the preliminary injunction that there was no content-based discrimination is binding, and plaintiffs cannot revise that injunction to suit their purposes on appeal.

In sum, plaintiffs obtained a preliminary injunction only because the court lacked a full picture of the law and facts. If plaintiffs wanted a merits determination instead of preliminary relief, they would have had to seek relief under Fed. R. Civ. P. 65(a)(2), which authorizes a court to "'order the trial of the action on the merits to be advanced and consolidated with the hearing on the application'" for a preliminary injunction. See also *Camenisch*, 451 U.S. at 395.

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[7] *See* J.A. 77 (COURT: "What does that mean? They both had nudity, and you say this one is different, what's different about it?" WITNESS: "[S]ometimes they had nudity, sometimes they didn't, sometimes they were told they had to go behind the screen, sometimes it was five people, sometimes it was fifty people." COURT: "Any other issues? Numbers of people, whether the screen is there, anything else?" WITNESS: "Well, the previous plays, you know, talked about John D. MacArthur and the history of the park and this one seems to be about a peace demonstration." COURT: "Why is that significant?" WITNESS: "Well, just that, from an operations standpoint, I mean the play is not significant, but the number of people could be different so we have to just take that into consideration.")

They did not. Having enjoyed the benefits of temporary relief, plaintiffs must likewise accept its limitations.

4. Plaintiffs claim that this Court has conferred prevailing-party status in two settings that fall short of full adjudication of the merits, Resp. Br. 29, and therefore that a preliminary injunction is sufficient. Plaintiffs' arguments do not respond to the State's contention that for plaintiffs to prevail, the defendants must bear legal responsibility for providing relief that resolves a legal claim, and are wrong on their own terms.

First, they note that a plaintiff who receives a "court-ordered consent decree[]" prevails, *Buckhannon*, 532 U.S. at 604, and that a consent decree does not entail full adjudication of the merits. Resp. Br. 31. Unlike a preliminary injunction, however, a consent decree is *not* interlocutory and provisional; instead, it resolves a plaintiffs' claim by ordering permanent relief enforceable by the court. *Buckhannon*, 532 U.S. at 604 & n.7. Conferring prevailing-party status on a plaintiff who obtains a consent decree does not violate the fundamental rule that a plaintiff "must be able to point to a *resolution* of the dispute which changes the legal relationship between itself and the defendant." *Tex. State Teachers Ass'n*, 489 U.S. at 792 (emphasis added). The opposite is true with respect to a preliminary injunction.

For similar reasons, plaintiffs inaptly rely on *Shalala* v. *Schaefer*, 509 U.S. 292 (1993). Resp. Br. 33. Under the statutory provision at issue in *Schaefer*, a plaintiff who obtains a vacatur of an agency denial of benefits and a remand to the agency has received not an interim or interlocutory decision, but a *final judgment on the merits that conclusively determines that the government violated federal law and ends the litigation in a court of law*. 509 U.S. at 296-98. The statutory scheme thus effectively defines prevailing-party status as receipt of a final judgment vacating a denial of benefits and remanding the matter to the agency. Indeed, *Schaefer*'s holding is that the judicial decision at issue was a *final* order (with the implications of such finality on the

running of the time for appeal). *Id.* at 297. This case does not assist plaintiffs' cause because, unlike a consent decree and the judgment in *Schaefer*, a preliminary injunction does impose upon the defendant legal responsibility for relief that resolves a claim as is required for prevailing-party status.

An interim order that addresses the potential merits but does not resolve a claim or provide final relief to the plaintiffs does not confer prevailing-party status. Interim favorable "legal holdings en route to a final judgment" are "not the stuff of which legal victories are made." *Hewitt*, 482 U.S. at 762, 760. See also *Hanrahan*, 446 U.S. at 759 (favorable rulings, including reversal of a directed verdict, are "not matters on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party"); *Rhodes* v. *Stewart*, 488 U.S. 1, 4 (1988) (per curiam) (plaintiff whose legal rights were violated does not prevail when the declaratory relief did not inure to his benefit).

5. Plaintiffs next argue that *permanent* injunctions support prevailing-party status and that the inquiries for preliminary and permanent injunctions "do not differ in any significant respect." Resp. Br. 29. In fact, the significant respect in which they differ is that plaintiffs must win. The plaintiff must demonstrate *actual success* on the merits, not a prediction of success; and the defendant must be shown to have violated federal law. See *Camenisch*, 451 U.S. at 395. The State's view thus does not "make every permanent injunction ineligible to convey prevailing party status, regardless of the strength of the merits." Resp. Br. 30 (emphasis omitted). A plaintiff who obtains a permanent injunction achieves actual success on the merits (unless it is reversed on appeal).

6. Plaintiffs argue that conferring prevailing-party status on those who do not obtain a full adjudication on the merits, such as those who obtain consent decrees, promotes judicial economy by obviating any need for such parties to litigate the matter to final judgment in order to support a fees award.

These considerations are inapt in the preliminary-injunction context. A plaintiff who obtains only a preliminary injunction has not received an order resolving a claim and making defendant legally responsible for relief, unlike one who obtains a consent decree. That plaintiff should not be treated as someone who has won relief for a claimed constitutional violation. And state officials seeking to defend their laws' constitutionality should not be treated as lawbreakers or penalized for conserving governmental and judicial resources by focusing on the merits decision rather than a highly disruptive emergency appeal.

Conferring prevailing-party status on plaintiffs who receive an injunction without more simply encourages plaintiffs with borderline cases to seek preliminary injunctions, where the standard of proof on the merits is lower. Plaintiffs' proposed rule would not encourage defendants to settle; it would encourage them not to enforce their laws pending a merits determination for fear of being required to pay attorney's fees even if the law were ultimately deemed constitutional. Any argument that awarding fees to plaintiffs who obtain only a preliminary injunction will have beneficial consequences is highly debatable.

Notably, the incentives plaintiffs posit would be perverse in this case. On plaintiffs' theory, the State officials here should have been encouraged by the entry of the preliminary injunction to settle and agree not to enforce their laws, although final judgment was entered in their favor and the constitutionality of their laws was upheld. The State has a strong interest in the enforcement of its valid laws and should not be "discouraged" for fear of paying fees for interim orders in non-meritorious cases.

7. Plaintiffs also claim that preliminary injunctions confer prevailing-party status based on § 1988's legislative history indicating that a preliminary injunction is sufficient and that a plaintiff is not required to obtain a *final* order to be a prevailing party. Resp. Br. 32-33, 37-38. The legislative

history does not indicate that preliminary injunctions confer prevailing-party status. Nor does the legislative history support plaintiffs' claim that something short of relief that definitively resolves a plaintiff's claim supports prevailing-party status.

In the cited legislative history, Congress stated that courts could award attorney's fees *before* a final order (*pendente lite*), and clarified that interim fee awards might be appropriate where plaintiffs have obtained a favorable judgment on the merits of at least one of their claims.[8] This does not support any alteration of the requirement that a plaintiff actually prevail on some claim.[9]

Bradley v. *School Board*, 416 U.S. 696 (1974), relied on in the legislative history, proves our point. *Bradley* did not involve a preliminary injunction; the plaintiffs had won *permanent* injunctive relief years before and were awaiting final approval of a series of desegregation plans. This Court concluded that in the circumstances of that case, it was unfair to the plaintiffs who had prevailed "[t]o delay a fee award until the entire litigation is concluded," *id.* at 722-23, and authorized interim fees awards. Nothing in *Bradley* (or the legislative history) suggests that a plaintiff who obtains only

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[8] *See* H.R. Rep. No. 94-1558, at 8 (1976) ("awards pendente lite are particularly important in protracted litigation, where it is difficult to predict with any certainty the date upon which a final order will be entered"); S. Rep. No. 94-1011, at 5 (1976) ("In appropriate circumstances, counsel fees under [the Act] may be awarded pendente lite. Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.") (citation omitted).

[9] Plaintiffs claim that they "finally prevailed" on their "claim for relief for the February 14, 2003 anti-war protest," Resp. Br. 39 n.14. But that is not a claim for relief – plaintiffs' legal claim was that the application of the State's nudity ban was a violation of their First Amendment rights – a claim that was lost on summary judgment.

temporary relief in a case pending decision on the merits is entitled to fees from a defendant not found to have violated federal law.

II. EITHER THE SUMMARY JUDGMENT ORDER OR, ALTERNATIVELY, THE MOOTING OF PLAINTIFFS' CLAIM BEFORE JUDGMENT PRECLUDES PREVAILING-PARTY STATUS.

A. Plaintiffs Lost This Case.

Plaintiffs' post hoc attempt to recast the preliminary injunction as enjoining a content-based decision, distinct from the summary judgment decision rejecting plaintiffs' constitutional challenge to the application of the nudity ban, is factually and legally wrong. Thus, even if some preliminary injunctions could support prevailing-party status, this one cannot. See Pet. Br. 28-31.

B. Prevailing-Party Status Cannot Be Based On A Preliminary Injunction Issued On A Legal Claim That is Mooted Before Decision.

Assuming *arguendo* that the summary judgment decision did not effectively reject the basis for the preliminary injunction, plaintiffs still would not be entitled to fees because the legal claim underlying the preliminary injunction issue was mooted before it was resolved. See Pet. App. 5a n.1. An underlying *merits* decision in a case mooted by happenstance or the prevailing party is vacated and given no legal effect. See *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) ("[a]n order vacating the judgment on grounds of mootness would deprive [a plaintiff] of its claim for attorney's fees under . . . § 1988 . . . because such fees are available only to a [prevailing] party"); *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) ("vacatur must be decreed for those judgments whose review is . . . prevented through happenstance") (internal citation and quotations omitted). A preliminary injunction should fare no better.

Plaintiffs say *Lewis* is irrelevant because this Court declined to decide whether fees are appropriate when a plaintiff secures final judgment on underlying claims that a defendant cannot appeal owing to mootness. Unlike in *Lewis*, plaintiffs here did not prevail on their underlying claim; and, as noted in Pet. Br. 33 & n.18, the preliminary injunction here was mooted *prior to any final judgment*. *Lewis* held that plaintiffs did not prevail because the circuit court's decision was moot prior to its final ruling. Plaintiffs who obtain preliminary injunctions on claims that are never resolved by the district court meet the same fate.

Indeed, in *Buckhannon*, this Court held that a plaintiff was not a prevailing party even when the *defendant's voluntary conduct* mooted a plaintiff's claim before judgment. Because the state's voluntary mooting of the lawsuit prevented the entry of a final judgment, it foreclosed any "corresponding alteration in the legal relationship of the parties," and the plaintiff was ineligible for fees. 532 U.S. at 605. *Buckhannon*'s logic entails the conclusion that plaintiffs' as-applied challenge to the nudity ban cannot support prevailing-party status because it became moot before it could be resolved.[10]

Plaintiffs and their amici claim that § 1983 claims often will be resolved by preliminary injunction and inherently mooted shortly thereafter. For that policy reason, they assert that preliminary injunctions must be able to provide the basis for an attorney's fees. Resp. Br. 40. Plaintiffs fail to address the established exception to the mootness doctrine for such

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[10] Plaintiffs say that plaintiff Simon lacked standing to pursue any claim other than an as-applied challenge to the nudity ban on February 14, 2003. From this, they conclude that the claims addressed in the summary judgment order finally dismissing their case must be different. Resp. Br. 44-45. The significance of Simon's lack of standing after February 14, 2003 is simply that his as-applied challenge to the nudity ban could have been dismissed for lack of jurisdiction, as well as lack of merit.

matters (capable of repetition yet evading review); indeed, one case plaintiffs cite notes that this exception is routinely applied in election cases. See *Gjertsen*, 751 F.2d at 202 (citing *Moore* v. *Ogilvie*, 394 U.S. 814 (1969)). Nor do plaintiffs confront this Court's established rule that a defendants' voluntary cessation of an illegal activity does not moot a claim. See *Friends of the Earth, Inc.* v. *Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 173 (2000). And, plaintiffs do not address the potential for damages claims. These points were cited by this Court in rejecting the catalyst theory in *Buckhannon*, 532 U.S. at 605-08. Finally, plaintiffs ignore the fundamental unfairness to state officials of holding that a plaintiff is a prevailing party based on a preliminary determination of the merits in which the State lacked a full opportunity to defend.

CONCLUSION

For these reasons and those set forth in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

CARRI S. LEININGER
JAMES O. WILLIAMS, JR.
WILLIAMS, LEININGER & CROSBY
1555 Palm Beach Lakes Blvd.
Suite 301
West Palm Beach, FL 33401
(561) 615-5666

VIRGINIA A. SEITZ*
DAVID S. PETRON
PANKAJ VENUGOPAL
ROBERT A. PARKER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

*Counsel of Record

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